U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0310 BLA

JAMES E. RISTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SCRUBET, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 04/11/2017
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for claimant.

Paul E. Jones and Denise Hall Scarberry (Jones, Walters, Turner & Shelton, PLLC), Pikeville, Kentucky, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:
Claimant appeals the Decision and Order Denying Benefits on Remand (2011-

BLA-05102) of Administrative Law Judge Lystra A. Harris rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on March 26, 2010 and is before the Board for the second time.

In her initial Decision and Order, applying amended Section 411(c)(4), 30 U.S.C. §921(c)(4),[1] the administrative law judge credited claimant with thirty years of coal mine employment in above ground mining, but found that none of his employment took place in conditions substantially similar to those in an underground mine. The administrative law judge therefore found that claimant did not establish the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. Decision and Order at 2 n.3, 8. However, considering whether claimant could affirmatively establish entitlement to benefits under 20 C.F.R. Part 718, the administrative law judge found that the evidence established the existence of clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b). *Id*. at 12. The administrative law judge also found that the evidence established total disability due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(b)(2), (c). *Id*. at 14-16. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's findings that the evidence established the existence of clinical pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), (4), 718.203(b). *Rister v. Scrubet, Inc.*, BRB No. 13-0185 BLA, slip op. at 3 n.4 (Jan. 23, 2014) (unpub.). The Board, however, vacated the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The Board also vacated the administrative law judge's findings that the blood gas study and medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(ii) and (iv).[2] *Rister*, BRB No. 13-0185 BLA, slip op. at 5-7.

---

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a claimant establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305(b).

[2] Consequently, the Board also vacated the administrative law judge's finding that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *Rister v. Scrubet, Inc.*, BRB No. 13-0185 BLA, slip op. at 3 n.4, 5 n.6 (Jan. 23, 2014) (unpub.)

Additionally, the Board noted that after the administrative law judge's Decision and Order, the Department of Labor promulgated regulations implementing Section 411(c)(4), providing a new standard for claimants to demonstrate that their working conditions were "substantially similar" to conditions in an underground mine. *Rister*, BRB No. 13-0185 BLA, slip op. at 8, *referencing* 20 C.F.R. §718.305(b)(2). The Board therefore vacated the administrative law judge's finding that claimant failed to establish the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. *Rister*, BRB No. 13-0185 BLA, slip op. at 9. The Board instructed the administrative law judge to reconsider whether claimant's testimony regarding his working conditions was sufficient under the new regulations to satisfy the "substantially similar" requirement of Section 411(c)(4). *Id*. The Board further instructed that, if the administrative law judge determined that claimant had not established the requisite fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption, she should re-determine whether claimant could otherwise establish entitlement to benefits under 20 C.F.R. Part 718.

On remand, the administrative law judge found that claimant did not establish fifteen years of employment in conditions substantially similar to those in an underground mine. The administrative law judge therefore found that claimant could not invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis. The administrative law judge further found that claimant did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), or a totally disabling respiratory or pulmonary impairment due to pneumoconiosis at 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge denied benefits.

In the present appeal, claimant contends that the administrative law judge erred in finding that he did not establish fifteen years of qualifying coal mine employment. Claimant also contends that the administrative law judge erred in finding that the evidence does not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), total respiratory disability at 20 C.F.R. §718.204(b)(2)(ii), (iv), or total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 5.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 411(c)(4) requires that a miner work for at least fifteen years either in "underground coal mines," or in "a coal mine other than an underground mine" in "substantially similar" conditions. 30 U.S.C. §921(c)(4). Further, Section 718.305(b)(2) provides that "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there."[4] 20 C.F.R. §718.305(b)(2).

Claimant argues that his uncontradicted testimony establishes that he was exposed to coal dust or rock dust on a regular daily basis for more than fifteen years in his above ground coal mine employment. Claimant's Brief at 17-24. Therefore, claimant asserts that he established more than fifteen years of coal mine employment in dust conditions that were substantially similar to the dust conditions in underground coal mines. *Id.* We disagree.

The administrative law judge noted that while claimant asserted that he was exposed to coal dust or rock dust on a daily basis, his testimony established that his working conditions varied throughout his career. Decision and Order on Remand at 5-6; Hearing Tr. at 24-30. Claimant testified that during the first five or six years of his coal

[4] The comments accompanying the Department of Labor's regulations further clarify claimant's burden in establishing substantial similarity:

> [T]he claimant need only focus on developing evidence addressing the dust conditions prevailing at the non-underground mine or mines at which the miner worked. The objective of this evidence is to show that the miner's duties regularly exposed him to coal mine dust, and thus that the miner's work conditions approximated those at an underground mine. The term "regularly" has been added to clarify that a demonstration of sporadic or incidental exposure is not sufficient to meet the claimant's burden. The fact-finder simply evaluates the evidence presented, and determines whether it credibly establishes that the miner's non-underground mine working conditions regularly exposed him to coal mine dust. If that fact is established to the fact-finder's satisfaction, the claimant has met his burden of showing substantial similarity.

78 Fed. Reg. 59,105 (Sept. 25, 2013); *see* Decision and Order on Remand at 4.

mine employment his duties involved "drilling rock and coal" with a rock dust drill and "running open cab dozers." Decision and Order on Remand at 5; Hearing Tr. at 24-25. Claimant testified that he was positioned within four feet of the site where the machine drilled "down through the rock and coal seams down to the original coal," and that he had to breathe in "quite a bit" of dust. Hearing Tr. at 25. Similarly, claimant testified that when he ran the open cab dozer, the dust would blow up from the blade and back onto him. Hearing Tr. at 26.

For the remainder of his coal mine employment, however, claimant testified that he ran excavators and dozers with enclosed, air-conditioned cabs. Decision and Order on Remand at 5. As summarized by the administrative law judge, when asked whether he was still exposed to dust inside the closed cab, claimant explained that "some dust" could get through the air conditioner's filter and "[s]ometimes the doors around the rubber seal would leak" and that "it varie[d]" depending on "what kind of shape" the machine was in or how old it was. Decision and Order on Remand at 5; Hearing Tr. at 27-30, 48. Claimant also testified that "sometimes" the air conditioner would malfunction and "[h]e'd have to leave the door or windows open to stay cool in the summertime," and that "sometimes" it would be two or three weeks or a month before the air conditioner was repaired. Hearing Tr. at 30-31, 44, 56-67. Finally, while claimant testified that "some of the time" between 1993 and 2006 he was "still running the drill" under a contract for another company, claimant did not specify how frequently he performed this additional drilling. Decision and Order on Remand at 5-6; Hearing Tr. at 47.

Based on claimant's unrebutted testimony, the administrative law judge found that when he was drilling and operating open cab equipment, a period of approximately five years, claimant was exposed to coal mine dust on a daily basis. Decision and Order on Remand at 6. The administrative law judge further found, however, that the dust exposure claimant described during the remainder of his employment, running excavators and dozers with closed cabs, was sporadic or incidental, occurring when air conditioning units malfunctioned or when the equipment was old. Decision and Order on Remand at 5, 6. The administrative law judge therefore found that claimant did not establish that fifteen years of his surface coal mine employment were "qualifying," i.e. took place in conditions substantially similar to those in an underground mine. *Id.*

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Here the administrative law judge permissibly found that, while credible, claimant's testimony that he was "sometimes" exposed to dust during the time he ran equipment with closed cabs did not

support the conclusion that his dust exposure was more than sporadic.[5] *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order on Remand at 6. Thus, the administrative law judge reasonably found that, with the exception of his first five or six years of employment, claimant did not demonstrate that he worked in conditions substantially similar to those in an underground coal mine. *See Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90, 25 BLR 2-633, 2-642-43 (6th Cir. 2014); *Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1343-44, 25 BLR 2-549, 2-564-66 (10th Cir. 2014); *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988).

We affirm the administrative law judge's finding that claimant did not establish fifteen years of qualifying coal mine employment because it is supported by substantial evidence. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005). Consequently, we affirm the administrative law judge's finding that claimant cannot invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

To establish entitlement to benefits under the Act, without the benefit of the presumption, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

[5] Claimant contends that the administrative law judge failed to consider claimant's testimony that he often worked as a laborer or as a mechanic outside of the closed cab. Employer's Brief at 21. Contrary to this characterization, claimant stated that he did "a little mechanic work," and did not specify whether this occurred during the first five years of his employment, or afterwards. Hearing Tr. at 28-29. Further, claimant testified that when he was working with enclosed-cab equipment, he "sometimes" did labor outside of the cab. Hearing Tr. at 28. Claimant has not shown how this testimony calls into question the administrative law judge's conclusion that claimant's dust exposure after the first five or six years of his employment was sporadic and incidental. Thus, any error by the administrative law judge in failing to specifically address this testimony is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Claimant asserts that the administrative law judge erred in her evaluation of the blood gas studies in finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). The record consists of five arterial blood gas studies dated May 21, 2010, June 30, 2010, August 4, 2010, March 2, 2011 and June 15, 2011. The June 30, 2010 study produced non-qualifying[6] values at rest. Exercise studies were not performed. Decision and Order on Remand 10; Director's Exhibit 14. The May 21, 2010 and June 15, 2011 studies, conducted by Drs. Baker and Ammisetty, respectively, produced non-qualifying values at rest and during exercise. Decision and Order on Remand at 10; Director's Exhibit 12; Claimant's Exhibit 3. In contrast, while the August 4, 2010 and March 2, 2011 studies, conducted by Drs. Rasmussen and Zaldivar, respectively, also produced non-qualifying values at rest, they produced qualifying values during exercise. Decision and Order on Remand at 10; Claimant's Exhibit 3; Employer's Exhibit 2.

The administrative law judge initially accorded the most weight to the exercise blood gas study results, permissibly finding that they were more indicative of claimant's respiratory ability to perform his usual coal mining work. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984); *Sturnick v. Consolidation Coal Co.*, 2 BLR 1-972, 1-977 (1980); Decision and Order on Remand at 9-10. Because the administrative law judge determined that all of the exercise blood gas studies were equally reliable, she concluded that, "at best, [the arterial blood gas study evidence] is in equipoise with [two] qualifying results and [two] non-qualifying results post-exercise." Decision and Order on Remand at 10. Thus the administrative law judge found that the preponderance of the blood gas study evidence does not establish total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order on Remand at 10.

Claimant argues that, based on Dr. Zaldivar's opinion that Dr. Ammisetty did not exercise claimant enough to produce a significant drop in oxygen, the administrative law judge should have discounted Dr. Ammisetty's June 15, 2011 non-qualifying blood gas study.[7] Claimant's Brief at 28; Employer's Exhibit 5 at 2. Thus, claimant argues, the administrative law judge should have accorded the greatest weight to Dr. Zaldivar's

[6] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

[7] Dr. Zaldivar stated, "Dr. Ammisetty apparently didn't exercise him enough to produce a significant drop in the oxygen." Employer's Exhibit 5. Dr. Zaldivar did not state that the test was invalid.

March 2, 2011 qualifying blood gas study because it was the most recent, reliable study of record. *Id.* at 28-29.

Contrary to claimant's assertion, in light of the fact that the regulations do not require that exercise be performed for a specific threshold duration or intensity before exercise study results can be substantiated, the administrative law judge permissibly determined that the four exercise blood gas studies are equally reliable because they are "in 'substantial compliance' with the requirements of the regulations [set forth] at [Section] 718.105(a)-(c)." [8] Decision and Order on Remand at 10; *see Orek v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987). The administrative law judge further permissibly found that the four exercise blood gas studies, all performed within thirteen months of one another, are equally probative. *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740-41, 25 BLR 2-675, 2-687-88 (6th Cir. 2014); Decision and Order on Remand at 10. As claimant raises no further error with respect to the administrative law judge's weighing of the blood gas studies, we affirm the administrative law judge's finding that the exercise blood gas study evidence is in equipoise and thus does not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(ii). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP* [*Ondecko*], 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); Decision and Order on Remand at 10.

Claimant next contends that the administrative law judge erred in finding that the medical opinion evidence does not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). In considering the disability opinions of Drs. Baker, Ammisetty, Rasmussen, Zaldivar and Rosenberg, the administrative law judge acknowledged the qualifications of the physicians,[9] and noted that "[o]nly Dr. Rosenberg opined that [c]laimant does not have a totally disabling respiratory or pulmonary impairment."[10]

[8] Under item 8 d. Type of exercise and duration, the test report states, "Treadmill 6 min." Claimant's Exhibit 3. Dr. Ammisetty certified the test results and utilized them in preparing his opinion. Like Dr. Zaldivar, Dr. Ammisetty is a Board-certified pulmonologist. *Id.*

[9] The administrative law judge stated that she "rank[ed] the qualifications of Drs. Baker, Zaldivar and Rosenberg equally[,] based on their shared [B]oard certifications in pulmonary medicine, B-reader certifications and expertise, followed closely by Drs. Ammisetty and Rasmussen[,] both of whom are slightly lesser credentialed." Decision and Order on Remand at 10.

[10] Dr. Rosenberg opined that claimant is not disabled from a pulmonary perspective. Director's Exhibit 14; Employer's Exhibits 4, 6. In contrast, Dr. Baker

Decision and Order on Remand at 10. The administrative law judge gave little probative weight to the opinions of Drs. Baker and Ammisetty because she found they are not well-reasoned. *Id.* at 12-13. The administrative law judge also gave little probative weight to Dr. Rasmussen's opinion because it is not well-documented and well-reasoned. *Id.* Finally, the administrative law judge gave little probative weight to the opinions of Drs. Zaldivar and Rosenberg because they are based on an incomplete picture of claimant's health. *Id.* at 13-14. Thus, the administrative law judge found that the medical opinion evidence did not establish total respiratory disability. *Id.*

Claimant generally asserts that "[c]learly, the evidence of the record reveals that the [c]laimant does not retain the physical capacity to return to the work of an underground [*sic*] miner." Claimant's Brief at 31. Claimant, however, raises no specific challenge to the administrative law judge's credibility determinations. Because the Board is not empowered to engage in de novo proceedings or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). General assertions of entitlement are insufficient to invoke the Board's review. *See* 20 C.F.R. §802.211(b). Because claimant raises no specific challenge to the administrative law judge's analysis and weighing of the medical opinion evidence, the administrative law judge's finding that the medical opinion evidence does not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv) is affirmed.

Finally, considering all of the evidence relevant to total disability, *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc), the administrative law judge permissibly found that claimant failed to establish that he is incapable of performing his usual coal mine work from a respiratory standpoint. Decision and Order on Remand at 14. In light of our affirmance of the administrative

---

opined that claimant should be totally disabled for working in the coal mining industry "[w]ith his advanced pneumoconiosis." Director's Exhibit 12. Dr. Ammisetty opined that "[claimant] could not work in the last mine job that needed high physical demand like heavy equipment operator/lifting heavy stuff/working in the [coal mines]" and is "100% disabled." Claimant's Exhibit 3. Dr. Rasmussen opined that claimant has disabling chronic lung disease. Claimant's Exhibit 4. Lastly, Dr. Zaldivar opined that claimant is severely impaired from a pulmonary standpoint and is incapable of performing any work above the sedentary level. Employer's Exhibits 2, 3.

law judge's finding that claimant did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2),[11] an essential element of entitlement under 20 C.F.R. Part 718,[12] we affirm the administrative law judge's denial of benefits. *Trent*, 11 BLR at 1-26; *Perry*, 9 BLR at 1-1.

[11] We note that because we have affirmed the administrative law judge's finding that claimant failed to establish that he is totally disabled, even assuming claimant could establish fifteen years of qualifying coal mine employment, claimant could not invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. § 921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[12] We, therefore, need not address claimant's arguments regarding the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *See Larioni*, 6 BLR at 1-1278.

Accordingly, the administrative law judge's Decision and Order Denying Benefits on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge